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IN THE

Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-1723

RAYMOND MUZQUIZ, et al.,
Petitioners,

vs.

CITY OF SAN ANTONIO, et al.,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opposition To Petition For A Writ Of Certiorari

Respondent, Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas, files this its Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit heretofore filed by Petitioners, Raymond Muzquiz, et al., and pray that such writ be denied.

STATUTORY PROVISIONS INVOLVED

The following Texas Statute is set forth in Appendix A hereto:

> Article 6243f, Vernon's Annotated Texas Statutes, Sections 1, 2, 5, 6, 19 (in full), 20, and 21.

Petitioners included only Section 19 of Article 6243f and omitted from this section the first sentence thereof, the first word of the second sentence, and the words "for the benefit of the Pension Fund" from the middle of said second sentence.

STATEMENT OF THE CASE

While Petitioners' Statement of the Case is largely correct they incorrectly state that they alleged as to jurisdiction "(3) Title 28 U.S.C.A. Sec. 1331 without regard to jurisdictional amount as the requirement is unconstitutional . . ." Petition, page 4. Indeed, they extensively plead that "one or more of the Plaintiffs . . . have an amount in excess of Ten Thousand Dollars $$10,000.00)." Appendix D, Fourth Amended Complaint, pages 75-76. This jurisdictional issue was brought up in this case for the first time in Petitioners' brief at the hearing **en banc** in the Fifth Circuit, contrary to the impression left by the language quoted above.

Exhibit A to the Case Stated (or **agreed** statement of facts) on which the District Court rendered judgment reflected that the greatest amount of "contributions" which could be credited to any one of the named Petitioners was the sum of $3,037.00 credited to Muzquiz and that all the rest had had less than $3,000.00 deducted at the source from their stated pay for the benefit of the Pension fund during their service in the San Antonio Police Department.

We likewise challenge the correctness of the sentence in the Petition, pages 4-5, reading "All four bases for jurisdiction were presented in the District Court which found jurisdiction to be present." Only three bases were plead (as shown above) and none argued in the District Court. Judge Clary dismissed the City of San Antonio **sua sponte** (see his opinion, Appendix C, Petition, page 30) and noted that "Defendants . . . conceded Jurisdiction for the purposes of . . . Motion for Summary Judgment." In fact,

Judge Clary refused to entertain argument on jurisdiction when offered (before argument on motions for summary judgment) because Judge Seals had long before overruled our motion thereon. Petition, Appendix C, page 31.

It should be noted that Petitioners apparently make no claim herein to jurisdiction against the City of San Antonio.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES, AS SUCH, HAVE NO POWER OR CONTROL WHATSOEVER OVER THE ADMINISTRATION OF THE PENSION FUND AND A SUIT AGAINST THEM IS IN REALITY A SUIT AGAINST THE ENTITY (BOARD OF TRUSTEES) IN WHICH SOLE POWER RESIDES. COMPLAINT, IN REALITY, IS SOLELY AGAINST A PARTICULAR PROVISION OF THE LAW ITSELF, AND NOT AGAINST THE ACTIONS OF THE TRUSTEES WHICH WERE UNDISPUTEDLY IN STRICT ACCORD WITH THE LAW.

II. CONGRESS HAS PASSED STATUTES WHICH CONTROL ACTIONS UNDER THE RELEVANT PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENT IN CASES OF THIS KIND WHICH ARE REASONABLE AND VALID.

III. THE JURISDICTIONAL AMOUNT REQUIREMENT OF TITLE 28 U.S.C.S. SEC. 1331 IS VALID AND HAS BEEN SO CONSIDERED FOR ALMOST 180 YEARS.

IV. TITLE 28 U.S.C.S. SEC. 1343 CANNOT BE SEPARATED FROM TITLE 42 U.S.C.S. SEC. 1983 FOR JURISDICTIONAL PURPOSES.

ARGUMENT

I. THE INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES, AS SUCH, HAVE NO POWER OR CONTROL WHATSOEVER OVER THE ADMINISTRATION OF THE PENSION FUND AND A SUIT AGAINST THEM IS IN REALITY A SUIT AGAINST THE ENTITY (BOARD OF TRUSTEES) IN WHICH SOLE POWER RESIDES. COMPLAINT, IN REALITY, IS SOLELY AGAINST A PARTICULAR PROVISION OF THE LAW ITSELF, AND NOT AGAINST THE ACTIONS OF THE TRUSTEES WHICH WERE UNDISPUTEDLY IN STRICT ACCORD WITH THE LAW.

The pension fund involved in this suit was created solely by the legislature of the State of Texas by enactment of Article 6243f, Vernon's Annotated Texas Statutes, in 1941. The statute has been often amended by the legislature. The fund is not governed by any other statute or by any charter or ordinance provisions of the City of San Antonio.

The landmark case of **City of Dallas vs. Trammell**, 101 S.W.2d 1009, 129 Tex. 150, 112 A.L.R. 997, (1937) by the Texas Supreme Court concerning a companion fund (Dallas, Article 6243a) holds that the legislature can freely amend or repeal the law creating such pension fund and that pension rights are "subordinate to the right of the Legislature to abolish the pension system, or diminish the accrued benefits of pensioners thereunder . . ." 101 S.W.2d at 1013.

We are not concerned here with the reasons for such ruling. Suffice it to say Respondent is a creature of the legislature and in essence an adjunct of the State of Texas. The firemen and policemen of San Antonio are not covered by the Social Security Act, nor have they ever been. The State of Texas has declared and manifested its interest, through the legislature, in providing these public servants (and the firemen and policemen of other big Texas cities) with the security and incentives of a liberal pension fund under complete State control because of the hazardous nature of their employment. **Firemen's and Policemen's Civil Service Commission, et al., vs. Wells**, 306 S.W.2d 895, 157 Tex. 644, (1957); Chap. 11, p. 14, 55th Leg., 1957, Sec. 3.

Although the "Board is simply a group of statutory trustees" **(Bolen vs. Board of Firemen, Policemen and Fire Alarm Operators of San Antonio, Texas,** 308 S.W.2d 904, writ refused (1958) at page 905) the pension fund does **not** "serve an essentially private function" under Texas Law. Appendix E, Petition, page 93. It does serve the public interest in a very important respect by greatly aiding in the recruitment and retention of capable big city firemen and policemen whose importance to the public peace and safety (the first order of business for **any** government) is obvious.

While disagreeing with Judge Tuttle in this regard we disagree, on the other hand, with Judge Godbold's conclusion that "the collective Board of Trustees of the Fund and the Fund itself are the same **arm or agency of the city.**" Appendix E, Petition, p. 107. The Board has sole control of the Fund (Art. 6243f, Sec. 2, our Appendix A, p. 16) and the

members of the Fund control the Board four to three inasmuch as two firemen and two policemen members elected by their departments constitute a majority thereof. Appendix A, Article 6243f, Sec. 1, page 15. The Fund is very closely connected with the city but it was created by the State and legislatively controlled by the State and the Board is independent of city control. We think it is in the nature of a State agency and hence not a "person" in the meaning of Title 42, Sec. 1983 for that reason.

As far as the individual trustees are concerned we must agree strongly with Judge Dyer "that this is a suit not against the nominal defendants, the individual board members who are 'persons,' but instead is a suit against an unnamed, though very real, party defendant, the Pension Board itself, an entity which, as we have held previously, is not a 'person.' " Appendix F, Petition, page 135.

This holding is supported by the pension law itself. All powers reside in the Board as an entity. Article 6243f, Sec. 2, Appendix A, Opposition, page 16. The individual trustees have absolutely no power whatsoever to take any kind of individual action, the internal administrative powers of the chairman and secretary aside. The Board, acting through a majority of a quorum, is everything. Act. 6243f, Sec. 5, Appendix A, Opposition, page 17.

As noted above, a majority of the trustees are themselves members of the fund elected by the members of the fund of their respective departments by secret ballot. Art. 6243f, Sec. 1, Appendix A, Opposition, page 15. The Mayor serves ex officio. Two councilmen are appointed by the Council. None of these serve on the Board as

"officers" in any usual sense. They all have other public offices. None of them receive any compensation or expense money. The pleadings of Petitioners have never accused them of doing anything other than follow the law which they are duty bound to follow. Indeed, the accusations by the Plaintiffs were directed solely against the constitutionality of Article 6243f, Sec. 19 (Appendix A, Opposition, page 18). To the extent that complaint is made at all against the trustees it is not against them individually but against them collectively. In any rational sense Judge Dyer is right.

Illustrating the irrationality of making the individual trustees liable to a suit on the basis of the allegations here is the fact that there has been a vast turnover in the membership of the Board during the pendency of this case. Seven trustees are named on the cover of the Petition. Only **one** of these seven is a trustee as this time (Henry Antan, a police captain). The present Mayor, Lila Cockrell, is the **fourth** mayor since the institution of this suit. The two council places have turned over at least three times as to each spot during this seven and a quarter years. Firemen Campa and Mason have been replaced with Medlock and Biegler. Policeman DiStefano has been replaced with Neaves. It would certainly have been correct for the new trustees to have been substituted as parties for the departed trustees, **ex officio,** but this turnover and Petitioners' failure to substitute the present trustees as parties, shows that the suit is against the entity, not the individuals, except in a purely formal sense. To monetarily reach the Fund solely through such nominal parties is to resort to

subterfuge and make a mockery of the true meaning of the word "persons" as used in Title 42, Sec. 1983 as heretofore interpreted by this Court.

II. CONGRESS HAS PASSED STATUTES WHICH CONTROL ACTIONS UNDER THE RELEVANT PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENT IN CASES OF THIS KIND WHICH ARE REASONABLE AND VALID.

Petitioners contend under this point that a litigant alleging a violation of a fifth or fourteenth amendment right thereby invokes the jurisdiction of a Federal District Court regardless of such considerations as amount of the claim, diversity, substantiality of the Federal question or existence of legislative jurisdiction whatever. We submt that this proposition is clearly unsound and invalid. Its adoption would have a revolutionary effect on Federal jurisdiction and threaten a veritable deluge of weak or spurious cases.

The true rule can be gleaned from a number of authorities. A few of these follow:

Williams, et al. vs. Miller, et al., 48 Fed.Supp. 277 (1942), U.S.D.C., N.D. Cal., affirmed 317 U.S. 599, 87 L.Ed 489, 63 S.Ct. 258, per curiam, holds that (1) "The District Courts of the United States have only such jurisdiction as is granted to them by Congress. Chicot County Drainage District vs. Baxter State Bank, 308 U.S. 371, 376, 60 S.Ct. 317, 84 L.Ed. 329;" and (2) "For a plaintiff to invoke successfully the jurisdiction of the District Court on the ground that he seeks protection of a federal right his complaint on its face must appear to raise a substantial federal question; a mere claim in words is not sufficient. Pac. Elec. Ry. Co. v. Los Angeles, 194 U.S. 112, 24 S.Ct. 586, 48 L.Ed. 896 . . ."

A distinction is drawn as far as the "amount in controversy" requirement for jurisdiction is concerned between personal civil rights and denials of civil rights concerning a property or monetary right. **Spears vs. Robinson,** 431 Fd. 1089 (1970) 8th Cir., at page 1091. The following quote from Judge Mehaffy's opinion, citing **Abernathy vs. Carpenter,** 208 F.Supp. 793 (W.D., Mo., 1963), aff'd per curiam, 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed.2d 409 (1963) is indicative:

> "In the **Abernathy** case, the three judge court, speaking through Judge Gibson, held that since the deprivation, if any, was not one of personal liability but merely a property right; it was not within the purview of the court's civil rights jurisdiction, 28 U.S.C. sec. 1343 and that the plaintiff's claims could not be aggregated to attain the jurisdictional amount . . ."

Many other authorities are cited.

A good terse discussion of these jurisdictional considerations may be found in **Quarles vs. State of Texas, et al.,** 312 F.Supp. 835 (1970) U.S.D.C., S.D., Tex. by Judge Noel. This case was dismissed for lack of jurisdiction based, **inter alia,** on lack of a substantial Federal question.

We think that this case should have been dismissed at the District Court level on this ground and that the Fifth Circuit might very well have based their jurisdictional ruling on this point. Judge Clary, in his scholarly opinion, Appendix C, Petition, page 51, said "Plaintiffs have propounded an aggregation

of Equal Protection claims which, individually and collectively, are almost entirely insubstantial." As to "due process" he said (same appendix, page 42) ". . . the plaintiffs are asking us to reverse 85 years of unbroken Constitutional law at the Federal level beginning at the Supreme Court with the landmark case of **Pennie vs. Reis,** 132 U.S. 464 (1889) 33 Law.Ed. 426 . . ."

Judge Tuttle, of the very able three judge panel which first passed on this case at the circuit level said this (Appendix E, Petition, page 100):

> "The plaintiffs raise a myriad of constitutional challenges to the no refund provisions of Art. 6243f, V.T.C.S. In our view, none of them has merit, and we accordingly affirm the district court's grant of summary judgment."

Judge Godbold, dissenting in part, concurred wholeheartedly with above ruling, disposing of this case on the merits. Appendix E. Petition, page 129, last sentence.

These statements by the able judges referred to spell (to our mind) an insubstantial claim. In any event, we think the case is moot in a practical sense. If reversed on jurisdictional grounds it would be hard for us to imagine anything other than a speedy reaffirmance on the merits.

III. THE JURISDICTIONAL AMOUNT REQUIREMENT OF TITLE 28 U.S.C.S. SEC. 1331 IS VALID AND HAS BEEN SO CONSIDERED FOR ALMOST 180 YEARS.

It is with difficulty that we treat this point seriously. Quite sincerely, Respondents consider it to be utterly without merit. What Petitioners are propos-

ing would literally revolutionize Federal jurisdiction and swamp already over burdened Federal courts.

Petitioners go back 189 years to the Constitutional Convention of 1787 and ask that on the strength of their own superficial interpretation thereof that the role of Congress in controlling jurisdiction at the District and Circuit Court levels be summarily revoked.

The quick answer to this nonsense is that the U. S. Constitution, Art. III, Sec. 1, invests the judicial power of the United States in this Court and ". . . in such inferior courts as the Congress may from time to time ordain and establish." Having the power to "ordain and establish" same it is incontrovertible that Congress has the power to prescribe their jurisdictions, consonant with other contitutional provisions and in the exercise of reasonable legislative discretion in the light of changing circumstances and the practical exigencies of the administration of justice.

It should be borne in mind that a denial of Federal jurisdiction here has not deprived petitioners of a remedy. These self same constitutional issues have been litigated several times in the State courts up to the Texas Supreme Court. Petitioners turned to the Federal courts only after their insubstantial constitutional claims had been thoroughly considered and emphatically rejected in the State courts. See **Richard R. Devon vs. Firemen and Policemen's Pension Board of Trustees of San Antonio, 443 S.W.2d** 598, writ refused, (1969) and cases cited therein.

It would almost seem that Petitioners have striven to strike a revolutionary Bicentennial note

in this case by going back 180 years (by their own admission, Petition, page 15) and asking this Court to completely remove the jurisdictional limitations placed on the inferior courts by Congress which it alone could create.

IV. TITLE 28 U.S.C.S. SEC. 1343 CANNOT BE SEPARATED FROM TITLE 42 U.S.C.S. SEC. 1983 FOR JURISDICTIONAL PURPOSES.

Title 42 U.S.C.S., Sec. 1983 cannot be separated from Title 28 U.S.C.S., Sec. 1334 (3) for the purpose of conferring jurisdiction in this case. As said in **Lynch vs. Household Finance Co.**, 405 U.S. 538, 543 (cited and quoted by petitioners at pages 18-19 of petition) ". . . when the Sec. 1983 claim alleges constitutional violations, Sec. 1343 (3) provides jurisdiction . . ."

Also, as pointed out in **Spears vs. Robinson,** supra, (this brief, page 9) ". . . if the alleged denial concerns a property or monetary right, the controlling authority is to the effect that the amount in controversy must exceed $10,000.00 exclusive of interest and costs, as required under 28 U.S.C., Secs. 1331 and 1332."

This Court pointed out in **Hagans vs. Lavine,** 415 U.S. 528, 39 L.Ed.2d 577, 94 S.Ct. 1372 at (L.Ed.) page 587 that ". . . the federal cause of action created by the section [Sec. 1983] does not by itself confer jurisdiction upon the federal district courts to adjudicate these claims. Accordingly, petitioners relied principally upon 28 U.S.C., Sec. 1343 (3) . . ." The point we draw is that jurisdiction in a case such as this depends on **both** sections.

This is expressed in **Quarles vs. State of Texas,** supra, (this brief page 9) as follows: "Likewise, 42 U.S.C., secs. 1981, 1983 do not grant jurisdiction. They merely afford **a remedy** in cases to which jurisdiction is granted by 28 U.S.C., sec. 1343 . . ." (emphasis added).

The question of insubstantuality, if it exists here, would also apply. Petitioners' fourth point adds nothing to the preceding points.

The conclusions drawn by Petitioners from **Lynch,** supra, on pages 20-21 of petition fail to take into account that in this case only property rights are involved (and that only allegedly, not in reality), not personal or political rights or liberties. Property rights **do** enjoy constitutional protection but apparently this Court has not made an exception to the jurisdictional amount to accommodate such suits as it may have done in connection with such things as "free speech and assembly."

CONCLUSION

For the above reasons the Court should deny the Petition for a Writ of Certiorari to the Fifth Circuit of Appeals.

Respectfully submitted,

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By _____
HARVEY L. HARDY

CERTIFICATE

I, Harvey L. Hardy, a member of the Bar of this Court (admitted February 14, 1949), representing Respondents herein, do certify that this Opposition For a Writ of Certiorari has been served on the following parties herein:

(1) On Petitioners by mailing two copies in a duly addressed envelope, with air mail postage prepaid, to Kermitt L. Waters, 323 Las Vegas Boulevard South, Las Vegas, Nevada 89101, of Counsel for Petitioners.

(2) On Respondent City of San Antonio by hand delivering two copies to Edgar A. Pfeil, Assistant City Attorney, City of San Antonio, 200 Main Plaza, Suite 103, San Antonio, Texas 78205.

I further certify that all parties required to be served have been served.

_____
HARVEY L. HARDY

APPENDIX A

ARTICLE 6243f, VERNON'S ANNOTATED TEXAS STATUTES

BOARD OF TRUSTEES

Section 1. In all incorporated cities containing more than five hundred thousand (500,000) inhabitants and less than seven hundred, fifty thousand (750,000) inhabitants according to the last preceding Federal Census or any future Federal Census and having a fully paid Fire and Police Department, there is created hereby (and continued if heretofore) a Firemen and Policemen's Pension Fund; provided, however, that once such pension system becomes operative in any city, any right or privilege accruing to any such members thereunder shall be a vested right and the same shall not be denied or abridged thereafter through any change in population of any such city taking such city out of the population (as herein prescribed) and said pension system shall continue to operate and function regardless of whether or not any future population exceeds or falls below said population. To govern said Firemen and Policemen's Pension Fund, there is hereby created a Board of Trustees to consist of seven (7) members, as follows: the mayor, two (2) aldermen, councilmen or commissioners, each to serve on this Board for the term of office to which they are elected, and to be elected to this Board by majority vote of the Board of Aldermen, Council or Board of Commissioners on which they serve; two (2) active firemen below the rank of Fire Chief, to be selected by the majority vote of the members of the Fire Department by secret ballot, one (1) for a term of two (2) years, and the

other for a term of four (4) years, and two (2) active policemen below the grade of Police Chief, to be selected by the majority vote of the members of the Police Department, by secret ballot, one (1) for a term of two (2) years, and the other for a term of four (4) years. All members from the Fire and Police Departments shall be elected by the contributors to the Fund, and shall serve until their successors are elected and qualified and their successors shall be elected for a term of four (4) years. These seven (7) trustees shall constitute the Board of Trustees of the Firemen and Policemen's Pension Fund, to provide for the disbursement of same, and to designate the beneficiaries thereof, and to have complete and independent control over said Pension Fund. Said Board shall be known as the Firemen and Policemen's Pension Fund Board of Trustees of San Antonio, Texas.

POWERS AND DUTIES OF BOARD

Section 2. The board shall organize by choosing one (1) member as chairman and one (1) member as secretary, which board shall control and administer the fund and shall order payments therefrom in pursuance of the provisions of this Act. It shall report annually to the governing body of such city, the condition of the Fund and the receipts and disbursements on account of same, with a complete list of the beneficiaries of the Fund, and the amounts paid them. The Board shall have the complete authority and power to administer all of the provisions of this Act and any implied powers under this Act.

* * * *

MEETINGS: DISBURSEMENTS: RECORDS

Section 5. The Board shall hold regular

monthly meetings and other meetings upon call of its Chairman, or written demand of a majority of the members. It shall issue orders signed by the Chairman and Secretary to the persons entitled thereto of the amounts of money ordered paid to such persons from such Fund by the said Board, which order shall state for what purpose such payments are to be made. It shall keep a record of the proceedings which record shall be of public record; it shall at each monthly meeting send to the City Treasurer a written list of persons entitled to the payment from the Fund, stating the amount of such payment and for what granted, which list shall be certified and signed by the Chairman and Secretary of such Board attested under oath. The Treasurer shall enter a copy of said list upon the book to be kept for the purpose, which book shall be known as the Record of the Firemen and Policemen's Pension Fund, and the said Board shall direct payment of the amounts herein to the persons entitled thereto out of said Fund. No money of said Fund shall be disbursed for any purpose without a majority vote of the Board which shall be a "No" and "Yes" vote entered upon the proceedings of the Board.

Section 6. The Treasurer of said City shall be Treasurer of said Fund. All money for said Fund shall be paid over to and received by the Treasurer for the use of said Fund, and the duties for which he shall be liable under his oath and bond as such City Treasurer, but he shall receive no compensation therefor.

* * * *

ACT AS ESSENCE OF EMPLOYMENT CONTRACT

Section 19. This Act shall be of the essence of the Contract of Employment and appointment of the Firemen and Policemen by cities of this class; and, the deferred payment is a part of the compensation for services rendered to the city. However, no member of either of said Departments or of said Fund shall ever be entitled to any refund from said Fund on account of the money deducted from their pay for the benefit of the Pension Fund which money is in itself declared to be public money, and the property of said Fund for the benefit of the members qualifying for benefits, and their beneficiaries.

VESTED RIGHTS

Section 20. The right is vested in the persons specified in the Act to participate in such Fund and to receive the payments in strict accord herewith; and the means of its enforcement shall never be impaired nor denied.

DEFICIENCY: PAYMENT BY CITY

Section 21. The Cities included in this class shall pay the deficiency, if any, between the money procured under the term of this Act and the amount of the deferred payments prescribed herein.